

**BEFORE THE**  
**STATE OF CALIFORNIA**  
**OCCUPATIONAL SAFETY AND HEALTH**  
**APPEALS BOARD**

In the Matter of the Appeal of:

SAN FRANCISCO OPERA ASSOCIATION  
301 Van Ness Avenue  
San Francisco, CA 94102

Employer

Docket Nos. 00-R1D1-3175  
and 3176

**DECISION AFTER  
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed in the above-entitled matter by the San Francisco Opera Association (Employer) under submission, makes the following decision after reconsideration.

**JURISDICTION**

Between May 23 and July 10, 2000, the Division of Occupational Safety and Health (the Division) conducted a complaint inspection at a place of employment maintained by Employer in San Francisco, California, in Room 2B of the Zellerbach Auditorium (Zellerbach), located at 300 Franklin Avenue, where Employer rehearsed operas for presentation to the public at the Opera House.

On September 8, 2000, as a result of the inspection, the Division issued citations to Employer alleging the violations and proposing the penalties that follow:

<b><u>Cit/Item</u></b>	<b><u>Section</u></b>	<b><u>Type</u></b>	<b><u>Penalty</u></b>
2	3210(a) <sup>1</sup> [guardrails on elevated locations]	Willful/General	\$5,000
1/1	3214(a) [handrails on stairs]	General	\$185

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<sup>1</sup> Unless otherwise specified all section references are to Title 8, California Code of Regulations.

Employer filed timely appeals contesting the existence of the alleged violations, the classification of the alleged violation of section 3210(a) as willful, and the reasonableness of all abatement requirements and proposed penalties.

A Board Administrative Law Judge (ALJ) heard Employer's appeals in San Francisco, California on November 15, 2001. In addition to Employer and the Division, the parties to the proceeding included affected employee Pamela Dale and Nora Heiber of the American Guild of Musical Artists (AGMA), an employee organization representing affected employees. All parties, excepting AGMA, submitted post-hearing briefs and, on March 6, 2002, the ALJ issued a written decision denying Employer's appeals from the violations of sections 3210(a) and 3214(a). On April 10, 2002, Employer petitioned the Board for reconsideration. The Division and affected employee Pamela Dale filed responses to the petition, and on May 30, 2002, the Board took Employer's petition under submission and stayed the ALJ's decision.

## **EVIDENCE**

Both citations pertained to conditions observed by Division Compliance Officer Michael Frye in May 2000 while inspecting a stage set Employer was using at Zellerbach to rehearse the opera "The Rake's Progress." For years, Employer had used the set to present the opera at the Opera House and it was to be moved back there and used again for that purpose in the year 2000.

Platforms elevated 63 and 76 inches above the auditorium floor were incorporated in the set and stairs at each end provided access between the auditorium floor and the elevated platforms. There were no railings along the open sides of the elevated portions of the set and no hand rails on the stairs. During rehearsals, opera cast members employed by Employer used the stairs to access the set and stood near the unguarded sides of the elevated platforms while performing.

Approximately a year earlier, in June 1999, another Division Compliance Officer, Michael Gerlach, went to the Opera House to investigate a complaint concerning exposure to chemical smoke and fog used in the presentation of another opera. He noticed that there were no railings on the open sides of stages. No employees were on the stages, so he issued a Notice in Lieu of Citation to Employer alleging that the unguarded sides of the stages presented a hazard subject to the guardrail requirements of section 3210(a).

Exception 13 to section 3210(a) excepts "the auditorium side of a stage, raised platforms and other raised floor areas such as runways, ramps and side stages used for entertainment or presentation" from the guardrail requirements.

## ISSUES

1. Were the elevated platforms and stairs on the set Employer was using to rehearse an opera at Zellerbach excepted from the guarding requirements of sections 3210(a) and 3214(a) by Exception 13?

2. Was the violation of section 3210(a) alleged in Citation 2 properly classified as willful?

## FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

### **1. The Elevated Platforms and Stairs Providing Access to Them at Zellerbach Were Not Excepted From the Guarding Requirements of Sections 3210(a) and 3214(a) While Being Used for Rehearsal Purposes.**

A principal purpose of the Occupational Safety and Health Act of 1973 (the Act) is to protect the health and safety of California employees through the adoption and enforcement of occupational safety and health standards and orders. (See Labor Code §§ 6300, 6305(a), 6307, 6308, 142.3 and 144.5.) The Act and its implementing safety orders are to be liberally construed to make work safe for employees. (See *Carmona v. Division of Industrial Safety* (1975) 13 Cal. 3d 303; *Bendix Forest Products Corp. v. Division of Occupational Safety and Health* (1979) 25 Cal. 3d 465.)

The same rules of construction and interpretation that apply to statutes apply to regulations, such as sections 3210(a) and 3214(a). (See, e.g., *Cal. Drive-In Restaurant Assn. v. Clark* (1943) 22 Cal. 2d 287; *California State Restaurant Assn. v. Whitlow* (1976) 58 Cal. App. 3d 340.)

“[Exceptions] to a statute’s general language indicate that the thing excepted would have been included in the general language if the exception had not been made ... [and] are [to be] strictly construed.” (Emphasis added) (58 Cal Jur 3d, Statutes § 131, p. 553 and cases cited there.) And, Employer had the burden of proving that Exception 13 to section 3210(a) applied while the stage set was being used for rehearsal purposes at Zellerbach. (See *Gal Concrete Construction Co.*, Cal/OSHA App. 89-317, Decision After Reconsideration (Sept. 27, 1990).)

In adopting section 3210(a), the Occupational Safety and Health Standards Board (Standards Board) determined that it was hazardous for employees to work from unenclosed “working levels more than 30 inches above the floor, ground or other working areas” and imposed the general rule that guardrails must be installed on all open sides of working levels of that elevation or greater.

Exception 13 was granted to enable the audience that a stage show is presented to entertain to receive the full visual benefit of the presentation. Those who attend rehearsals at Zellerbach to, e.g., assess an opera's readiness for presentation to an audience, are not within the class of viewers the exception is designed to accommodate. Therefore, we construe Exception 13 to apply only to "the auditorium side of a stage, raised platforms and other raised floor areas such as runways, ramps and side stages" while they are being used to present an opera or other entertainment to an audience it was intended and prepared to entertain.

Chorus singers (choristers) working for Employer used the unguarded stairs and elevated platforms while rehearsing at Zellerbach. They were exposed to the fall hazards presented by the lack of guarding. Accordingly, we find that Employer violated section 3214(a)<sup>2</sup> and section 3210(a) as alleged by the Division in Citation 1, Item 1 and Citation 2, respectively.

## **2. The Division Did Not Prove That Employer's Violation of Section 3210(a) was Willful**

From the "History" of section 334 [Classification of Violations and Definitions] of the regulations of the Director of Industrial Relations<sup>3</sup> contained in Barclays California Code of Regulations, it would appear that the definition of "Willful Violation" set forth in section 334(e) was adopted in 1975 or, at the latest, 1977, and has remained unchanged since. It reads as follows:

(e) Willful Violation---is a violation where evidence shows that the employer committed an intentional and knowing, as contrasted with inadvertent, violation, and the employer is conscious of the fact that what he is doing constitutes a violation of a safety law; or, even though the employer was not consciously violating a safety law, he was aware that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition.

On June 24, 1999, David Gerlach (Gerlach), a Division Industrial Hygienist, went to the Opera House to investigate a complaint that employees involved in "theatrical presentations" were being exposed to possibly hazardous

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<sup>2</sup> In its petition for reconsideration, Employer argues that Exception 13 which follows section 3210 also applies as an exception to the requirements for rails on stairs contained in section 3214(a) for which Employer was also cited. We find that Employer's attempt to bootstrap the exception in one safety order into another safety order is without merit. If the Standards Board intended Exception 13 to apply to the stair railing requirements in section 3214(a), it would have expressly provided a similar exception for section 3214(a) or would have otherwise adopted language incorporating Exception 13 into section 3214 which it did not do. Since this argument was the essential basis for reconsideration of the violation of section 3214(a) which we reject, we affirm the violation of section 3214(a).

<sup>3</sup> By Labor Code section 6319(c), the Legislature directed the Director of Industrial Relations to "...promulgate regulations covering the assessment of civil penalties under..." Division 5 [Safety in Employment], Chapter 1 [Jurisdiction and Duties] of the Labor Code.

artificial smoke and fog released for theatrical effect during the presentations. During his inspection of the smoke and fog complaint no employees were on or about the stage sets used to present operas, but he noticed that on some of them, "ramps, stairs and/or platforms were missing guardrails." (Exhibit 9))

At the conclusion of his inspection, Gerlach conducted a closing conference with Employer representatives, including Employer's Technical Director Patrick Markle. Gerlach discussed the smoke and fog complaint and said that the lack of guardrails was "a problem" without identifying the stage sets that, in his opinion, had a guardrail "problem".

Later he drafted a citation addressing the theatrical smoke and fog complaint and the Information Memorandum that is the first page of the Division's Exhibit 9, had them approved by the District Manager and gave them to Administrative Office Assistant Cora De Los Reyes for certified mailing to Employer. The memorandum recites section 3210(a) then states that, "Employees were working on stage sets in which ramps, stairs and/or platforms were missing guardrails, thereby creating a fall hazard." The Information Memorandum form number is "Cal/OSHA-5".

The second page of Exhibit 9 consists of copies of two documents. One is a copy of a U.S. Postal Service card on which the sender, in this case the Division, identifies the addressee (San Francisco Opera Association, 301 Van Ness Ave., San Francisco, CA 94101,) and indicates the type of service requested (Certified). Also attached is a U.S. Postal Service "Receipt for Certified Mail" prepared by the Division which states that mail addressed to Employer was postmarked or dated "12/24/99" included "CALOSHA 2, 4, & 5." It is not a "Return Receipt" showing when, where and to whom the mail was delivered.

Division Administrative Office Assistant Cora De Los Reyes testified the documents copied on the second page of Exhibit 9 are the standard proof of service forms used by the Division. She signed the "Receipt for Certified Mail" which the U.S. Postal Service returned to the Division to signify that the mail had been received and dated by the Postal Service.

"A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of business." (Evidence Code § 641) Division Exhibit 9 and the testimony of Administrative Office Assistant Cora De Los Reyes raised the presumption that the letter she mailed to Employer was received. Her testimony that she included the Information Memorandum in the envelope mailed, and her testimony explaining that the reference to "CALOSHA 5" on the "Receipt for Certified Mail" she prepared was a reference to the Information Memorandum, are sufficient to prove it was in the letter she mailed, whether it came to Markel's attention or not.

When Gerlach conducted his inspection, Exception 13 to section 3210(a) provided, in pertinent part, that the elevated location guardrail requirement did not apply:

On the auditorium side of a stage, raised platforms and other raised floor areas such as runways, ramps and side stages used for entertainment or presentation.

Nothing in the record indicates that Gerlach's "missing guardrails" concern applied to employees other than those participating in the "theatrical presentations". Employer witness Patrick Markle testified that he was generally aware of section 3210(a) and Exception 13 at the time of the 1999 inspection and that he informed Gerlach that Employer believed that section 3210(a) did not apply to the Opera House stage sets Gerlach inspected because of Exception 13. Gerlach did not refute Markle's testimony on this point.<sup>4</sup>

The information Gerlach conveyed to Employer would appear to conflict with Exception 13 if, as the record indicates, he was stating that guardrails must be erected on "the auditorium side of a stage...used for entertainment or presentation." At any rate, the Information Memorandum was stated in general terms that could lead the reader to that conclusion and, thus, may not fairly be construed as notice to Employer of a violative condition.

The Division may prove a violation is willful by showing that, "...the employer committed an intentional and knowing, as contrasted with inadvertent, violation, and the employer is conscious of the fact that what he is doing constitutes a violation of a safety law." (§334(e)) We agree with the ALJ. We find that the Division failed to prove Employer committed a willful violation under that criterion because Gerlach's testimony and Information Memorandum were insufficient to put Employer on notice of the fact that not erecting guardrails around the elevated platforms on "The Rake's Progress" set during rehearsals at the Zellerbach Auditorium would violate section 3210(a). And, proof that Employer knew that section 3210(a) applied was essential to establish that Employer intentionally violated section 3210(a) and was conscious of that fact.

The Division could also have established that the violation was willful by proving that Employer "...was aware that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition." (§334(e).)

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<sup>4</sup> The ALJ did not credit Markle's testimony that he understood after speaking with Gerlach in 1999 that guardrails were not required on sets during rehearsals. The ALJ reasoned that if Gerlach did not discuss whether or not there was a distinction between the guardrail requirements on sets during rehearsals as opposed to performances, then Gerlach could not be the source for Employer's post-1999 belief that guardrails were not required on sets during rehearsals. We believe the conclusion does not necessarily follow since Employer's pre-1999 belief was that guardrails were exempt from theatrical performances and that the exemption extended to rehearsals performed on the same set. Gerlach stated nothing to dispel Employer's belief that would have made Employer aware of the non-applicability of Exception 13 to rehearsals.

Exception 13 authorizes Employer to use “The Rake’s Progress” set “for entertainment or presentation” without guarding the “auditorium side...of the raised platforms.” Hence, when so used, the unguarded auditorium sides of the platforms are not an “unsafe or hazardous condition” that Employer had to make a “reasonable effort to eliminate” (see § 334(e)) by complying with section 3210(a).

Employer had used “The Rake’s Progress” set for years to present that opera to audiences at the Opera House. In that sense, the set was “used for entertainment or presentation.” (Exception 13) During rehearsals at Zellerbach Auditorium, the set was used by the same types of employees, opera singers and choristers, who were doing, or trying to do, exactly what they would do, and who were exposed to the same fall risks they would encounter, when presenting the opera to audiences at the Opera House.

Rehearsals are essential and integral to the entertainment or presentation value of an opera. Therefore, one might reasonably conclude that sets used for rehearsals are being “used for entertainment or presentation” purposes. Gerlach’s 1999 inspection and Information Memorandum did not address that possible distinction and, thus, did nothing to make Employer aware that rehearsing without railings was an “unsafe or hazardous condition” that, within the meaning of section 334(e), it had to make a “reasonable effort to eliminate” to avoid being charged with a willful violation. Accordingly, we find that the Division failed to prove Employer was aware of an “unsafe or hazardous” condition requiring elimination. And, having already found that the Division failed to prove Employer knowingly or intentionally violated section 3210(a), we conclude the Division did not establish that the violation was willful.

The \$5,000 proposed penalty is unreasonable for a general violation. It is reduced to \$185, the same penalty that the parties stipulated had been correctly calculated by the Division in accordance with the Directors regulations for the general violation of section 3214(a) alleged in Citation 1, Item 1.

## **DECISION AFTER RECONSIDERATION**

### **Docket No. 00-R1D1-3175**

Employer's appeal from Citation 1, Item 1, is denied. A violation of section 3214(a) is found to exist and a civil penalty of \$185 is assessed.

**Docket No. 00-R1D1-3176**

Employer's appeal from Citation 2 is granted to the extent of reducing the classification of the violation of section 3210(a) to general and the civil penalty to \$185, and otherwise denied.

GERALD PAYTON O'HARA, Member  
MARCY V. SAUNDERS, Member

Board Chairwoman Traeger dissenting.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: March 14, 2005